Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	**CC Docket No. 96-262**
	)	
Price Cap Performance Review For Local Exchange Carriers	)	**CC Docket No. 94-1**
	)	
MCI Telecommunications Corporation Emergency Petition for Prescription Of Access Charges	)	**CC Docket No. 97-250**
	)	
Consumer Federation of America Petition for Rulemaking	)	**RM – 9210**

REPLY COMMENTS OF
NEXTLINK COMMUNICATIONS, INC.

NEXTLINK Communications, Inc. ("NEXTLINK") hereby files its Reply Comments in response to the Commission's October 5, 1998 Public Notice asking parties for additional comment on the record in the Access Charge Reform and Price Cap dockets.[1]

I. INTRODUCTION

The primary concern of the Commission has been and should continue to be the protection of the consumer through the promotion of vigorous competition. The Commission recognized in its Access Charge Reform Order that loosening its pro-competitive and pro-consumer rules before the advent of competition would pose a serious threat to the welfare of

[1] Access Charge Reform, CC Docket No. 96-262, 12 FCC Rcd 15982 (1997) ("Access Charge Reform Order"), aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, No. 97-2618 (8th Cir. Aug. 19, 1998); Price Cap Performance Review for Local Exchange Carriers, CC Docket 94-1, 12

consumers and the very competition that the Commission is attempting to foster in access markets.[2] It is clear from the comments that actual competition has not yet developed to the point where incumbent local exchange carriers' ("ILECs") provision of access services should be deregulated. Moreover, the proposals for pricing flexibility proposed by Ameritech, Bell Atlantic and the United States Telephone Association ("USTA"), are designed to stifle the development of competition, not foster it. If the Commission chooses to adopt criteria for the deregulation of ILECs' access services, such criteria must be based on measures of actual competition in access markets.

The record, nonetheless, demonstrates that the Commission's pro-competitive policies, including its support for market-based reform of access markets, has begun to bear fruit in the form of billions of dollars of competitive local exchange carrier ("CLEC") investment in competitive facilities. NEXTLINK alone has deployed infrastructure in over 33 markets across the country over the last two years and has plans for its network to reach 27 million access lines by the year 2000. The deployment of this kind of alternative infrastructure across the country can provide a sustainable competitive facilities-based threat to ILECs if the Commission does not prematurely loosen the regulatory reins on the ILECs. The evidence of CLEC activity in response to the Commission's Access Charge Reform Order therefore demonstrates that the Commission's market-based approach to access charge reform is working and is on the right track. But the Commission must continue its support for the current approach, working on eliminating remaining barriers to competition for CLECs to bring the full benefits of competition to access markets, while preserving necessary safeguards until that competition is viable.

FCC Rcd 16642 (1997), appeal pending sub nom. USTA v. FCC, No. 97-1469 (D.C. Cir.).

[2] Access Charge Reform Order, 12 FCC Rcd at 16097-98, para. 270.

II. THE EVIDENCE IN THE RENEWED RECORD DEMONSTRATES THAT CLEC COMPETITION HAS NOT DEVELOPED TO THE POINT WHERE ILECS SHOULD BE GRANTED PRICING FLEXIBILITY

A. PRICING FLEXIBILITY SHOULD BE GRANTED TO ILECS ONLY UPON VERIFIABLE EVIDENCE THAT THERE IS SUFFICIENT AND SUSTAINABLE COMPETITION IN ACCESS MARKETS

It is critical to the continued success of its market-based approach that the Commission apply strong tests to measure whether there is sufficient and sustainable competition in access markets before the Commission begins deregulating the ILECs' provision of access services.[3] The evidence of "competition" presented by ILEC commenters, however, is only evidence of CLEC presence in the market, not effective competition. For example, Ameritech, in its comments, claims that evidence such as mere measures of trunks and switches deployed by CLECs shows significant competition.[4] The initial deployment of facilities, however, does not alone equal actual competition, especially where many barriers to entry still exist.[5] Only when consumers and carriers can and do choose alternative providers of access services will ILECs be forced to respond to competitive market conditions. At present, by any measure, CLECs have only a very small percentage of the local market.[6]

In the absence of such competition, "pricing flexibility" for ILECs would simply facilitate cross-subsidization, predatory pricing, and other anti-competitive actions.[7] AT&T

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[3] In contrast to assertions made by some Bell Operating Companies ("BOCs") in their Section 271 applications, there is simply no statutory prohibition that would prevent the Commission from using measurements of actual market share to determine the level of competition in access markets and as a trigger for ILEC pricing flexibility.

[4] See Ameritech Comments at Attachments B, C, D, E (deployment of fiber, switches, and number of buildings "passed" by competitor facilities).

[5] See also TimeWarner Comments at 4-5 (Commission's "Fiber Deployment Update: End of Year 1997" shows that CLECs had deployed over 1.8 million miles of fiber nationwide.)

[6] See KMC Comments at 2; ALTS Comments at 6-7.

[7] See e.g., AT&T Comments at 8-9; MCI Comments at 36-43; CompTel Comments at 18-19; Ad

correctly notes that pricing flexibility and geographic deaveraging would allow ILECs to maintain prices above competitive levels in low-density noncompetitive areas to generate revenues that could be used to subsidize predatory pricing in high-density areas where competition is beginning to emerge.[8] CLECs, with their smaller volume of traffic and smaller customer-base, are particularly vulnerable to this type of anti-competitive activity.[9] Indeed, NEXTLINK's experience is that the ILECs already have enormous power and an array of options to target the markets and customers where CLECs are attempting to compete. There is simply no evidence in the renewed record that would support a change in the Commission's previous conclusion in the Access Charge Reform Order that deregulation of the ILECs' monopoly over access services before the establishment of competition would injure consumers and stifle the prospects for competition itself.[10]

The ILECs, in fact, appear at times to admit that they seek pricing flexibility now in order to limit the competition that is clearly emerging. USTA, for example, asserts that the Commission must provide pricing flexibility to its members as soon as markets are open to potential competition and not after CLECs have actually entered the market.[11] Such comments reveal that the ILECs' true intent in obtaining pricing flexibility now is to curtail and eliminate the competition that is emerging before such competition even begins to threaten the ILECs' dominant market status.

Hoc Telecommunications Users Group Comments at 30-31; MediaOne Group Comments at 3-6; TimeWarner Comments at 17-19.

[8] AT&T Comments at 9-10.

[9] See TimeWarner Comments at 17-19.

[10] See e.g., ALTS Comments at 5.

[11] USTA Comments at 30-31.

B. BELL ATLANTIC'S AND AMERITECH'S PROPOSALS ARE BASED ON IRRELEVANT AND INADEQUATE CRITERIA

NEXTLINK has no objections to the Commission's developing a phased-in approach to deregulation of ILECs' provision of access services, so long as any deregulation is tied to clear, relevant and sufficient measures of competitive activity in those access markets. Ameritech, Bell Atlantic and USTA's proposals, however, do not meet these criteria.[12] Rather, their proposals appear primarily designed to deregulate their current monopoly over the provision of access services before competition can take hold or offer real choices.[13] Not surprisingly, the majority of commenters agree that the Commission should not adopt any of the ILECs' pricing flexibility proposals.[14]

The ILECs' proposals are wholly inadequate and unsupported. For example, Ameritech's proposed trigger for Phase I relief, the existence of a single approved interconnection agreement, is set so that Ameritech, and most probably every other large ILEC, immediately qualifies.[15] But the existence of a single approved interconnection agreement demonstrates almost nothing.[16] CLECs must clear not only legal and contractual hurdles, such as obtaining an interconnection agreement, but must also deploy facilities and overcome other operational barriers before they can begin to compete with ILECs. Bell Atlantic's and USTA's proposed requirements for Phase

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[12] Letter from Kenneth Rust, Director, Federal Regulatory Affairs, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, April 27, 1998; Letter from Anthony M. Alessi, Director, Federal Relations, Ameritech, to Magalie Roman Salas, Secretary, Federal Communications Commission, June 5, 1998. See USTA Comments at 35-38.

[13] Sprint Comments at 10 (ILECs appear to be asking for more than they presently need).

[14] See e.g., AT&T Comments at 8-10; Sprint Comments at 10; Media One Group Comments at 3-6; ALTS Comments at 5-8; KMC Comments at 3-8; Time Warner Comments at 13-14.

[15] AT&T Comments at 10; KMC Comments at 4. This is ironic given the fact that competitive alternatives are only beginning to arrive in the market.

[16] See AT&T Comments at 10; ALTS Comments at 5-8; KMC Comments at 5.

I are only slightly more demanding, but also are designed to provide immediate relief to ILECs.[17] The presence of one hundred unbundled loops in service and the use of interim number portability are hardly indicators of actual competition for access services.[18]

The ILECs' proposals also set inadequate triggers for their second and third phases of relief. Phase II relief would be granted to ILECs when "competitors have the ability to offer service to 25% of the market." Ameritech asserts that, moreover, this should be determined only by measuring whether competitors have "access" via collocation arrangements to 25 percent of the "DS-1 equivalents" or interstate minutes of use.[19] Ameritech would provide Phase III relief when competitors could "address" 75 percent of the above criteria. Neither measure, however, gives the Commission any indication of whether any CLEC has captured any share of the access market, whether any CLEC is a credible competitor in the marketplace and is perceived as such by consumers or whether competition is sustainable.

In addition, the proposed relief that follows from these inadequate measures is too broad, particularly in relationship to the minimal triggers proposed for the relief. The ILECs' proposals could grant relief in an entire state or LATA on the basis of one competitor in one central office of that area.[20] They also would provide dramatic pricing flexibility, whether in the form of individual contracts or otherwise, that would allow ILECs to squelch competitive entry through

[17] Bell Atlantic would require the presence of one hundred unbundled loops in service.

[18] AT&T Comments at 10; KMC Comments at 5-6.

[19] Ameritech Comments at Attachment M. Nothing in this test tells the Commission whether barriers to entry preclude competitors from serving customers with those DS-1 equivalents or minutes of use. In any event, other customers without alternatives would remain as fertile sources of revenues for cross-subsidization.

[20] See KMC Comments at 6-7.

cross-subsidization or predatory pricing.[21]

If and when the Commission adopts criteria that would trigger pricing flexibility for the ILECs, the majority of comments in the record support the adoption of measures that demonstrate the actual level of competition in access markets, not the potential for competition.[22] When the Commission considered the deregulation of AT&T's provision of interstate services, the Commission consistently evaluated AT&T's share of those markets to determine whether AT&T remained dominant and wielded market power.[23] If the Commission had applied the criteria proposed by Ameritech and Bell Atlantic to its deregulation of AT&T, AT&T would have had its rates deregulated soon after MCI won the right to legally compete against AT&T. After all, once MCI could potentially compete, it theoretically could address 25, 75 or even 100 percent of the market.[24] However, without facilities in place and the ability to develop a credible alternative to AT&T in the marketplace, MCI would never have been able to provide effective competition to AT&T in the interexchange marketplace.

Premature deregulation for AT&T would have given AT&T the opportunity to crush emerging competition in the interexchange market before the necessary groundwork in facilities investment was made by competing carriers. Instead, the Commission pursued a steady course of deregulation for AT&T that reflected the pace of competitors' success in the market and the

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[21] Id.

[22] Sprint Comments at 12-13; MCI Comments at 44; Excel Comments at 3; ALTS Comments at 5-8; Competitive Pricing Institute Comments at 9-11; General Services Administration Comments at 7-9.

[23] See MCI Comments at 60-62; TimeWarner Comments at 14-17 (AT&T not allowed authority to set ICB rates until Commission found that AT&T did not have cost structure advantage).

[24] See e.g., Regulatory Policies Concerning Resale and Shared Use of Common Carrier Facilities, 60 FCC 2d 261 (1976).

growth of actual competition.[25] It was only after competitors achieved roughly a 40 percent market share that the Commission substantially deregulated AT&T's provision of interstate services.[26] The Commission should similarly ignore ILECs proposals to use "potential competition" as a substitute for actual competition in access markets if and when it considers providing ILECs' with greater pricing flexibility.

III. THE RECORD SUPPORTS CONTINUING THE MARKET-BASED APPROACH TO ACCESS CHARGE REFORM

The comments received by the Commission largely support the Commission's current course of permitting market forces sufficient time to develop competitive access markets. Every carrier, except for the largest interexchange carriers, supports continuing the Commission's market-based approach.[27] Shortening the timeframe for the development of competition in access charges from the original timeframe set by the Commission in its Access Charge Reform Order would seriously damage the prospects that competition will ever develop in these

[25] See Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991). See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), recon. denied, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 46791 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, 49 Fed. Reg. 11856 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), rev'd and remanded sub nom., MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[26] See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271 (1995). The Commission stated that "AT&T's steadily declining market share for long distance services also supports the conclusion that AT&T lacks market power in the relevant market. Id. at 3307, para. 67.

[27] See e.g., Time Warner Comments at 3; BellSouth Comments at 13; US WEST Comments at 16-18.

markets.[28] The Commission's plan to use prescriptive rates only as a safeguard after an almost four year period recognizes the need to allow the time for the market to work.[29]

As many commenters stated, a more prescriptive approach to access charge reform could greatly damage the prospect for the evolution of competitive access markets.[30] Any gain from a prescriptive approach would at best be a one-time benefit with no assurance that the resulting rates actually reflect the costs of providing the service.[31] In addition, the Commission could set rates at such a level that new entrants could never attract the level of investment necessary to continue their investments in new facilities.[32] The comments show that the market-based approach is beginning to work, but the Commission needs to continue to take actions that will promote the current positive environment for competitive entry into access markets, while resisting the ILECs' pleas for premature deregulation. The Commission's market-based approach to open access markets to competition ultimately will result in market forces that drive access rates to cost.

The Commission's market-based approach recognized that it would take time for CLECs to deploy the facilities necessary to be a competitive threat to the ILECs. In fact, the Commission may have been overly optimistic in projecting the rate at which CLECs could begin to provide a competitive alternative on a broad scale, given the unexpected setbacks along the way.[33] Indeed, there remain a multitude of barriers that have made progress towards competition

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[28] Access Charge Reform Order, 12 FCC at 16096-97, paras. 266-268.

[29] Id.

[30] See USTA Comments at 10-19; BellSouth Comments at 13; Bell Atlantic Comments at 17; TimeWarner Comments at 3.

[31] See TimeWarner Comments at 3-4.

[32] Id.

[33] See CoreComm Comments at 3-4.

more difficult than the Commission might have initially expected when it released its Access Charge Reform Order. As with all efforts that the Commission has undertaken to move a monopoly market to competition, this process will continue to require significant Commission oversight and involvement in order to promote competition as well as to protect consumers from abuses resulting from ILECs' domination of access markets.

Commenters have confirmed that many of the barriers to entry identified by NEXTLINK in its comments are slowing the development of competition in access markets.[34] The Commission's oversight of the transition to competition in access services is, of course, closely related to the effort to introduce competition to local exchange markets, where many of the same barriers have slowed or completely stopped new entrants from offering competition. These barriers include continued failure of ILECs to comply fully with their obligations to provide nondiscriminatory access to their bottleneck facilities,[35] access to buildings and rights-of-way,[36] discriminatory state and local regulations, and general regulatory uncertainty created by countless ILEC challenges to the Commission's rules. The Commission should focus its efforts on those proceedings, such as its docket on Section 706 issues, where the Commission can continue its progress towards eliminating all barriers to entry, and not venture prematurely into deregulation of ILEC access services.[37]

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[34] See e.g. ALTS Comments at 5-8; CoreComm Comments at 3-4; KMC Comments at 3.

[35] TimeWarner Comments at 5-6 (ILECs provide inadequate collocation arrangements; failure to provide access to recombine network elements).

[36] See NEXTLINK Letter to Mr. Steven Shaye, Project Manager – Right of Way Study – New York Public Service Commission, October 30, 1998.

[37] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 (rel. Aug. 7, 1998).

IV. CONCLUSION

The comments received by the Commission support continuing a market-based approach to access charge reform, while rejecting the pleas of the ILECs for grant of premature pricing flexibility. Commenters have submitted evidence that CLECs, in reliance on the Commission's market-based approach to reform, have deployed billions of dollars worth of facilities that lay the groundwork for greater competition in access markets. Given the pace of development of competition in telecommunications markets in the last eighteen months, and the Commission's own recognition that structural barriers to competition remain, it is simply too soon for the Commission to reconsider its market-based approach to access charge reform.

At the same time, the ILECs' pricing flexibility proposals would provide another powerful weapon for the ILECs to destroy the emerging competition that is the predicate to the Commission's market-based approach. Premature pricing flexibility would discourage competitive entry, threatens consumer welfare, and undermines the other goals of the Telecommunications Act of 1996. By putting deregulation before the advent of real competition, the proposed pricing flexibility will enable ILECs to stifle the competition that the Commission so anxiously awaits. The Commission should continue the course of market-based reform it set out, insisting that competition come to access markets before pricing flexibility and deregulation are granted.

Respectfully submitted,

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